

*Modica mora*, in producing one whom we are bound to enter, makes him not incur the penalty, says *Paulus J. C. tus in Lege* 91, § 3, *D. de Verborum Obligationibus*,—*Hattomani liber juris consultus dictus, pagina* 66. *Vide supra, 1st November 1677, Jameson. Vide 18th January 1679, thir same parties. See Lanfrancus Balbus, decisione* 345.

*Advocates' MS. No. 699, folio* 314.

1679. *January 18.*—In the action between Cleland of Hearshaw and Lockhart of Birkhill, (*Vide 1st January 1678*;) the Lords having ordained the instrument to be proven in thir terms,—That, when they sisted and offered him, Hamilton of Green either discharged them to take him to prison directly, or in words of equipollent sense; the *testes instrumentarii* being examined, *viz.* Monkland and Raploch, they deponed that Green only refused to accept of him there, at his own house.

The Lords having advised the testimonies, they found the depositions did not prove; and therefore found the letters orderly proceeded against the cautioners.

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1677 and 1679. HARY, &c. STRAITONS *against* their Brother, the LAIRD of LAURISTON.

1677. *November 8.*—A FATHER dies, leaving several children: he grants a bond of provision, to be paid by his eldest son to the younger, and ordains their portions to be paid to them at their age of fifteen years, or at the next term after their marriage. *Quæritur* in whose option this alternative is. It may seem to be introduced in favours of the eldest son, who is debtor; for, *in alternativis obligationibus, electio est debitoris*; especially here, that if they die before the term of payment, it is provided their portion shall fall in return, and accresce to the eldest. Yet, others think it is in the option of the children, that, either at fifteen or at the next term after their marriage, they may call for their principal sum; for the annualrent is unquestionably due to them for their aliment: otherwise (say they) this inconvenience will follow, that it shall force them, immediately after they are fifteen, if their brother refuse payment, to anticipate and run headlong on marriage, and so the clause would abridge *libertatem matrimonii* and that mature deliberation which is requisite in a case of so great concern; which is absurd, and *contra leges et bonos mores*. And they make a distinction *inter alternativa et alternata*, which I conceive not; only we say, in patronages, *vicibus alternatis, not alternativis*.

*Advocates' MS. No. 650, § 4, folio* 305.

1679. *January 21.*—In the actions pursued by Hary, &c. Straitons, children of the second marriage to the Laird of Lauriston, against Lauriston their brother of the first marriage, for payment of their portions natural, or provisions due at their marriage, or age of fifteen,—*vide 8th November 1677*,—the Lords found the election of their alternatives was *debitoris*; and therefore that their portions were not due at fifteen, but only at their marriage; which was the election made by the heir, their eldest brother, who was debtor. This decision was upon a report.

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